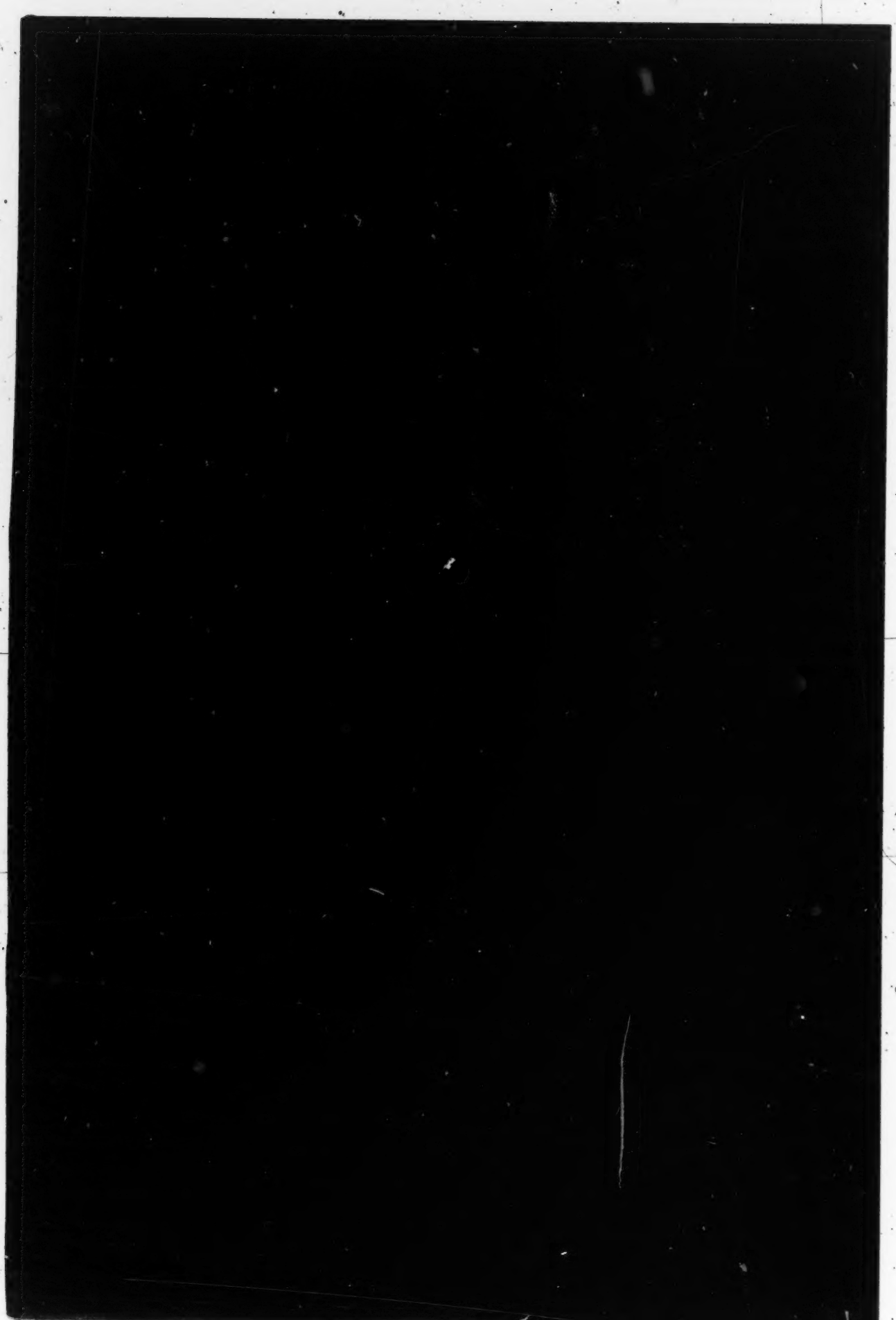

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

I. L. CLAYTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court is not reported. It has been printed as Appendix A to the Jurisdictional Statement in the related case of *I. L. Clayton* v. *United States*, No. 893, this Term.

JURISDICTION

The United States brought this action seeking, *inter alia*, a permanent injunction restraining the enforcement of certain provisions of the North Carolina Sales and Use Tax Act and the regulations issued thereunder as unconstitutional. A three-judge district court denied the request for injunctive relief

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and, pursuant to 28 U.S.C. 1253, the United States appealed directly to this Court from that order. The order below was entered on October 18, 1965. Notice of appeal was filed on November 15, 1965. (R. 65–68.)[1] On December 29, 1965, and on February 10, 1966, the district court extended the time for the United States to docket its appeal to February 14, 1966, and March 16, 1966, respectively. This Court's jurisdiction rests on 28 U.S.C. 1253 and 2101.

QUESTION PRESENTED

Whether a three-judge district court should enjoin the assessment and collection of a State sales tax which unconstitutionally discriminates against the United States.

STATEMENT

The facts and the parties' contentions are set forth in more detail in the government's Motion to Dismiss or Affirm filed today in a related case, No. 893, this Term. In summary, the United States sought below, *inter alia*, to permanently enjoin the assessment and collection of the North Carolina sales tax from contractors dealing with the United States, where the economic burden of the tax would be passed on to the United States. The North Carolina statute in question allowed that State's counties and incorpo-

[1] Record references are to the typewritten record filed with this Court in connection with the appeal of the Commissioner of Revenue of the State of North Carolina in No. 893 (this Term). Since the entire record of the action below was filed in conjunction with that appeal, no record is being filed with this Jurisdictional Statement.

rated cities and towns which had indirectly paid a sales tax by reimbursing a private contractor therefor to obtain a refund of the tax so paid. It did not, however, allow the United States to obtain a similar refund of sales taxes borne by it. The three-judge district court agreed with the government that the tax as applied constituted an unconstitutional discrimination against the United States. However, the court denied the requested injunctive relief, and instead held that the United States was entitled only to the same right as that granted to North Carolina's political subdivisions, *i.e.*, to obtain a refund of sales taxes paid by its contractors and passed on to it.

The instant appeal is taken as a protective measure in the event that probable jurisdiction is noted in No. 893, the State Revenue Commissioner's appeal. Should the court dismiss that appeal or affirm the judgment of the three-judge district court, as the United States is urging, the government will withdraw the instant cross-appeal.

ARGUMENT

The United States is satisfied with the judgment of the three-judge district court, namely, that contractors hired by the United States should pay the tax and that the United States is then entitled to file a claim for refund, just as North Carolina's political subdivisions do, and that the United States is entitled to recover the taxes paid since July 1, 1961. If, contrary to our contention in No. 893, the relief granted by the lower court was wrong, then we believe that assessment and collection of the tax from contractors

hired by the United States should be permanently enjoined.[2] Moreover, where, as here, a tax has actually been paid and its exaction is invalid as in violation of the Constitution, the United States can, even in the absence of an express refund provision in the State statute, compel its refund. See *United States* v. *Wurts*, 303 U.S. 414, 415; *Osborn* v. *United States*, 9 Wheat. 738, 869; *Board of Commissioners* v. *United States*, 308 U.S. 343; *United States* v. *Bureau of Revenue of State of New Mexico*, 291 F. 2d 677, 678–679 (C.A. 10).

CONCLUSION

In the event that probable jurisdiction should be noted in No. 893, this Term, probable jurisdiction should be noted in the instant case.

Respectfully submitted.

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Solicitor General.
RICHARD M. ROBERTS,
Acting Assistant Attorney General.
I. HENRY KUTZ,
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Attorneys.

MARCH 1966.

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[2] *United States* v. *City of Detroit*, 355 U.S. 446, 473; *Moses Lake Homes* v. *Grant County*, 365 U.S. 744, 751; *Phillips Co.* v. *Dumas School Dist.*, 361 U.S. 376; *United States* v. *Department of Revenue of State of Ill.*, 191 F. Supp. 723 (N.D. Ill.), vacated and remanded, 368 U.S. 30, on remand, 202 F. Supp. 757, affirmed *per curiam*, 371 U.S. 21; *Knapp-Stiles* v. *Dept. of Revenue*, 370 Mich. 629, 122 N.W. 2d 642; *Comptroller* v. *Pitts.-Des Moines*, 231 Md. 132, 189 A. 2d 107, certiorari denied, 375 U.S. 821; and *Mason & Hanger-Silas Mason Co.* v. *Iowa St. Tax Commission*, 139 N.W. 2d 437 (Sup. Ct. Iowa).

U.S. GOVERNMENT PRINTING OFFICE: 1966

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